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THE UNITED KINGDOM AS MEMBER OF THE EUROPEAN COMMUNITY

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Introduction

In the world of politics rhetorics and drama often obscure the realities of life by which relations between individuals and nations are governed. In this respect the European Community is no exception. In this paper it is intended to focus attention on the realities of life which govern the British membership of the European Community and to attempt an assessment of the legal problems involved and, of the British attitudes towards the European venture.

Historical Antecedents

In a historical sense the idea of a European Community goes back to Henri IV of Navarre who, at the beginning of the 17th century, thought of uniting Europe (of course under the leadership of France) in order to roll back the advance of Islam. He did not succeed; nor did succeed imperialist adventures of Napoleon or certain ideologies such as Communism which in the summer of 1920 was halted at the gates of Warsaw or Nazism which, having unleashed the Second World War, was defeated in 1945 after six years of a most destructive struggle. However, at that stage history repeated itself for, as with Islam of old, Western Europe felt under threat from the Soviet advance. That advance was achieved not just by the force of arms but also by agreement reached at Yalta on 12 February 1945 by the three leading allied powers: the U.S., Great Britain and the Soviet Union. Fear brings people together and so some say¹ that Stalin was the chief architect of the European Community.

Several factors, besides fear, contributed to West European alignment. The Second World War destroyed the world order in which West European countries ruled vast colonial empires and dominated international politics. The decolonization process which followed reduced them in size to their European territories and with the ever-increasing number

1 H.-P. Spaak, *Combats inachevés*, 1969, p. 67.

of states reduced their influence in world affairs. The War reduced Europe to a smouldering heap of rubble economically and politically; it undermined the concept of the sovereign state as the ultimate goal and good in itself demanding total sacrifice of the citizen and promising, in return, complete protection. That promise could no longer be kept since even the mightiest military powers were humiliated by enemy occupation. Only Britain, thanks more to her geographical position than anything else, remained unsoiled by the boots of the foreign soldier. Indeed she emerged the only truly victorious country, her territory intact, her institutions triumphant. The British, a proud, self-assured nation looked down upon their European allies and former enemies.

For these reasons, the demise of West European powers was not felt to affect Great Britain because, despite the loss of Burma and troubles in the Indian sub-continent leading to the British retreat, the vast colonial empire seemed safe or, perhaps, destined to a gradual transformation into the British Commonwealth of Nations, following the examples of Australia, Canada, New Zealand and South Africa after the First World War. In the world councils Great Britain was a great power destined to play a leading rôle and, through the special relationship with the United States of America forged during the struggle against the European dictators and Japan, an added transatlantic rôle.

At home the resilient British people began to re-build their devastated cities and the ruined industry. Britain, like other West European countries profited from the Marshall Plan addressed in 1947 to the entire Continent of Europe, but failed to appreciate the potential of the American programme for the relief of poverty and for economic reconstruction not merely for the re-building of the European economy but primarily for the nascent European solidarity. To the British the participation in the Marshall Plan meant simply an aid to the British economy and not an aid to a European collective.

In Britain the social contract between the citizen and the state remained unbroken. Indeed it was strengthened through victory in war.

Thus the citizen could look for protection in confidence to the sovereign state and its institutions rather than putting his hope into new forms of international cooperation. Therefore the revival of the nineteenth century's continental federalist ideas, which certainly had an impact upon the legal structure of the European Community, found only a faint echo in the British Isles despite the contention that "the principle of national sovereignty has exhausted its usefulness"². To the British pragmatic mind these ideas were alien and unworkable in practice.

Although a party to the Yalta agreements which effectively divided Europe and, contrary to the Atlantic Charter³, denied the right of self-determination to the nations of Central and Eastern Europe, Winston Churchill soon realized the danger of Soviet advance and in his speech in Fulton, Missouri, on 5 March 1946 warned the world of the consequences of the "Iron Curtain" which was drawn across the Continent of Europe. Geographically the danger was less remote to Britain than the continental Western Europe. However events on the Continent, particularly the coup d'état in Prague (1948) and the Berlin Blockade (1948-49) intensified the fear and led to the Military Alliance based on the Brussels Treaty of 1948⁴ converted a year later into the North Atlantic Treaty Organization (NATO)⁵, of which Britain was one of the principal architects. Significantly NATO is based on the principle of sovereign equality of the participating countries.

Co-operation in the field of defence was paralleled by economic and political co-operation. Here again the voice of Winston Churchill, in a speech at Zürich in 1946, that "we must build a kind of United States of Europe" sounded prophetic but carried little commitment on the part of the British. At that stage he was no longer in government but in opposition. Although he urged European unity based on a partnership

2 H. Laski, *Liberty in the Modern State*, introduction, 1948.

3 Signed by the Allied Governments and Soviet Russia in London on 24 September 1941.

4 The Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence.

5 The North Atlantic Treaty signed in Washington on 4 April 1949.

between France and Germany, in this process he saw the British rôle merely as that of a friend and sponsor, together with the United States of America and the British Commonwealth - clearly not that of a founding state⁶. Despite her moral standing Great Britain did not aspire to political leadership in Europe.

In May 1948 the various European movements joined in a Congress of Europe held at the Hague under the presidency of Winston Churchill and this, in turn, led to the establishment of the Council of Europe in 1949. The original membership of the five countries of the Brussels Military Alliance (France, Belgium, Holland, Luxembourg and the United Kingdom) grew to 21 at present. However the Council of Europe, based on sovereignty seemingly favoured by the British, has, despite certain achievements especially in the field of Human Rights and parliamentary and cultural exchanges as well as some initiatives to liberalize trade, proved a political failure. Indeed it lacks the kind of structure that would promote supra-national policies and ensure that they are carried out.

Whilst participating in the Organization for the European Co-operation and the Organization for Economic Co-operation and Development which in turn succeeded the Marshall Plan, the British favoured non-structured, sovereignty based approach to European Trade. Hence the promotion of the European Free Trade Area (the so-called Maudling Plan) and, when that foundered, the European Free Trade Association (EFTA). In this way the British hoped to achieve a sufficient degree of economic co-operation without surrender of sovereignty whilst the Council of Europe would achieve the same in the field of political integration. Clearly this approach fell short of the Churchillian call for European unity and could hardly match the more advanced thinking of Continental statesmen.

The British attitude towards European integration was further complicated by internal politics. In the British two party system, i.e. one party in Her Majesty's Government and the other in Her Majesty's Opposition, an agreed national policy is difficult to come by for what one party proposes the other automatically opposes. Therefore it happens (as was the case with the British entry to the Community) that a party in oppo-

6 U. Kitzinger, The European Common Market and Community, 1967, p. 37.

sition would oppose the Government policy but when in government would not necessarily carry out what it preached in opposition. And, vice versa, a party in opposition will not necessarily support the continuation of its own former policy by the government in office. This inconsistency was well demonstrated by successive post-war governments. Evidently the responsibility of office is not the same as the responsibility in opposition.

Moreover, as between the two leading parties the Conservative Party (reflecting the views of the Confederation of the British Industry) has shown itself to be more "pro-European" than the Labour Party (dominated by the Trade Unions). To a continental European the insularity of the British socialist may appear paradoxical but it reflects the nature and composition of the Labour Party as well as the British politics. It should not surprise anyone that when it was proposed that Britain should participate in a European Assembly as part of the Council of Europe the then Foreign Secretary (himself a prominent Trade Union leader) of the first post-war Labour Government was reported to have said: "I don't like it. I don't like it. If you open that Pandora's Box you will find it full of Trojan horses"⁷.

Therefore, sceptical of the European initiatives and uncertain of her own rôle in Europe, Great Britain did not respond to the Schuman Plan, never joined the Coal and Steel Community (although she did establish a form of contractual association with it) and cold-shouldered the deliberations which led to the Treaties of Rome. It took several years of keen observation for the British to convince themselves of the credibility of the "United Europe" advocated by Churchill and it required a strong leader and convinced European in the person of Harold Macmillan, the Prime Minister of a Conservative Government, to realize that British destiny was inextricably tied up with the Continent of Europe. However after the years of indecision and hesitation the United Kingdom, instead of being one of the architects of the European Community, ended up as a third-time postulant for admission.

7 A.H. Robertson, The Council of Europe, 2nd ed. 1961, p. 6, n. 23.

The Negotiations

Under the premiership of Macmillan the British "Atlantic rôle" was regarded as compatible with a European orientation leading to the membership of the European Communities. In 1961 the Conservative Government applied for membership but, after almost two years of detailed negotiations when the British side was ready to sign the Treaty of Accession, the application was vetoed at a press conference by a personal statement of the President of France. President de Gaulle considered that the British were not sufficiently European and that neither their transatlantic connections of the "Anglo-Saxon world" nor their commerce or industry would fit into the European Common Market. The British entry would change the nature of the Community and open up many problems including that of an American intrusion. De Gaulle contended that the enlargement of the Community would destroy its integrative impact. Consequently it would disintegrate into a Communauté atlantique colossale sous dépendance et direction américaines⁸.

The British were surprised and disappointed. Since the admission of new members requires a unanimous decision of the Council of Ministers any existing Member State could veto the application. However the timing, the place and the form of the veto remain objectionable.

The second application in 1967 by the Labour Government under Prime Minister Harold Wilson who, criticising the failure of the previous government, would not take "No" for an answer was also vetoed by France but, this time, in Council before the negotiations had begun. It seems the same considerations as before with the added argument that the British economy was not up to standard motivated the French veto.

With the departure of General de Gaulle and a new style of government in France under President Pompidou, the third British attempt of the

8 Text of Press Conference of 14 January 1963; C. Philip, Les Institutions Européennes, 1981, p. 69.

Conservative Government of Edward Heath (who was the chief negotiator in 1961-63), in company with Denmark, Ireland and Norway, was successful. However there was dissention at home. Despite the Government's enthusiasm the opinion polls revealed a considerable opposition in the country and the Labour Party, now in opposition, mounted a determined campaign against the accession. It appears that whilst ready to accept the terms of admission when in power, it would not accept the same terms when in opposition. Opponents in principle contended there was no advantage in accession whilst the surrender of sovereignty was an unforgivable and irreparable mistake.

In a debate in the House of Commons on 28 October 1971, the Government secured a reasonable majority⁹ with the support of the Liberal Party and Labour dissenters from the official policy of the Opposition, who voted for the entry in principle but pledged themselves to oppose the consequential legislation. Thus the historic decision, which merited a national unity, was tarnished by party politics. On 20 January 1972¹⁰ a last-minute attempt to prevent the signing of the Treaty of Accession until "the full text has been published and its contents laid before the House", was foiled by a majority of 21 for the Government, the Conservative opponents abstaining and the Labour members voting en bloc in accordance with the party instructions.

Fundamental Re-negotiations and thereafter

After the general elections in 1974 which brought the Labour Party back to power the new government, as promised in its election manifesto, initiated the so-called fundamental re-negotiations of the conditions of the British membership of the Community. The promise arose out of the contention that the Conservative Government sold Britain cheap and that a Labour Government would have obtained better

⁹ Hansard, House of Commons 1970-71, Vol. 823, col. 2212.

¹⁰ Ibid. 1971-72, Vol. 829, col. 800.

terms of entry. Contained in the speech of the Foreign Secretary to the Council of Ministers on 1 April 1974¹¹ the British complaints centred on the Common Agricultural Policy, the British budgetary contribution, the advance towards the economic and monetary union, the regional, industrial and fiscal policies, capital movements, disregard of the British Commonwealth and of the developing countries and the anti-American stance of the Community. The Minister concluded saying that if the re-negotiations were successful the British people should have the right to decide upon membership through a general election or a consultative referendum. Should they fail the British government would not regard the Treaty obligations as binding.

After a year of discussions the results were recommended to the British people in a Government White Paper¹² and the Prime Minister's speech to the House of Commons¹³. However a scrutiny of the proceedings¹⁴ reveals that the discussions between the British Government and the Community were neither fundamental to membership nor in the nature of re-negotiations of the terms of entry comprised in the Treaty of Accession. The results did not alter the position beyond confirming that the British contribution to the Community budget was excessive and, therefore, subject to the "corrective mechanism", which means that it was negotiable¹⁵.

As promised a Referendum was held¹⁶ but it was merely a "consultative referendum" in which the electorate were asked: "Do you think that the United Kingdom should stay in the European Community (the Common Market)?"

11 European Communities No. 8 (1974), Renegotiations of the Terms of Entry into the European Economic Community (Cmd. 5593) EC Bull 3/14, point 1104.

12 Membership of the European Community, Report on Renegotiations (Cmd. 6003).

13 Statement of the Prime Minister to the House of Commons (Cmd. 5999); House of Commons, Official Report (5th series) (18 March 1975), cols. 1456-1480.

14 D. Lasok, Some Legal Aspects of Fundamental Renegotiations, ELR 5 (1976) 375. 381 et seq.

15 Agreed for all the Member States at the Dublin Summit of March 1975, EC Bull. 3-1975, point 1103.

16 Referendum on United Kingdom Membership of the European Community (Cmd. 5925).

This was a novel experience because the institution of referendum is unknown to the British where matters of principle are settled by General Elections and in the Parliament rather than a popular vote¹⁷. It was hardly an appeal to the sovereignty of the people, since, no matter the result, Parliament was to take the final decision. At the end two-thirds of the voting electorate, prompted by the Government to say "Yes", decided to stay in the Community.

However, despite the clear mandate from the electorate, the debate continues. It is fuelled by the deficiencies of the Community system and the wrangles over the budgetary contribution as well as the lack of a clear perception of the Community or the rôle Britain ought to play. The Referendum, as a party political exercise, made no significant difference in this respect and the Labour Government failed to play a positive rôle or to reflect the European conviction of the electorate. Moreover, when again in opposition, the Party at its annual conferences in 1980, 1981 and 1982 voted for withdrawal from the Community. Only after the General Election of 1983 which firmly established the Conservative rule, some leading members of the Labour Party recognized at the 1983 Party Conference that withdrawal may not be a realistic proposition. Indeed the question of the membership was no longer a prominent issue at the conferences of 1984 or 1985¹⁸.

Conservative governments proved more positive though quite reticent on the question of integration and federalism. Britain, no doubt to preserve her position on the world money market and to safeguard the status of the pound sterling as a reserve currency, has not joined the European Monetary System. A great deal of time and energy has been spent on sorting out the disproportionate British budgetary contribution

17 The only other example was a form of plebiscite in Northern Ireland to confirm the territorial status quo vis-a-vis the Irish Republic; see Northern Ireland (Border Poll) Act 1972.

18 Note, however, that as reported in "Europe" 13 June 1985, p.4, the leader of the 32 strong British Labour Party in the European Parliament declared that "as a committed anti-marketeer he will continue to campaign for the withdrawal of the United Kingdom from the Community".

and the seemingly incurable Common Agricultural Policy which, adversely affecting the cost of living, has no friends among the British public.

The British attitude towards the further development of the Community, coloured by the British constitutional experience, is in a sharp contrast with that of the continental countries. The British favour a slow, pragmatic evolution building upon concrete achievements and look askance at rhetorics, dramatic gestures and integration on paper. The British would not engage in the contest for the title of the more advanced European and therefore took no position on the so-called "two-speed plan for economic integration" propounded by the Tindemans Report¹⁹, according to which the "weaker" members, i.e. Ireland, Italy and the United Kingdom should proceed at a slower pace than the others.

Similarly there was no enthusiasm in Britain for the Draft Treaty Establishing the European Union²⁰ prepared by the Committee on Institutional Affairs of the European Parliament²¹ when so much has yet to be done in order to carry into effect the Treaty establishing the Common Market²². Indeed the Commission White Paper²³ urging the completion of the Community Internal Market by 1992 has received a positive response as a practical plan to achieve what already should have been achieved.

In response to the pre-Milan Summit agitation the British spokesman at the Committee of Permanent Representatives²⁴ stressed that, at this moment, his country stood for unity rather than union. More precisely the British agenda for Community action include the creation of a genuine common market; industrial and technological co-operation; foreign policy and security co-operation; an improvement of the decision-making process by resorting more often to the majority vote and practising abstention

19 EC Bull. Supp. 1/76. See J.D.B. Mitchell, The Tindemans Report - Retrospect and Prospect (1976), 13 CML Rev. 455.

20 Summary, EC Bull. 2-1984, Vol. 12.

21 (O.J. 1981, C.234). Resolutions of 14 Sept. 1981 and 13 Sept. 1982 (O.J. 1982 C.238); Report PE 83.326/fin/A, Document 1-575-/B3/A; 15 July 1983.

22 See the British response, Europe, 22 June 1985, p. 13.

23 COM (85) 310 Final.

24 Europe 10/11 June 1985, p. 5 and 6.

rather than veto where at present unanimity is required. In brief the British would improve the status quo rather than embark on a new treaty which, in their view, would only weaken the Community.

Consistently with this stance the British Prime Minister opposed, at the Milan Summit (28-29 June 1985), the joint Franco-German proposal (laid on the table as a surprise) of a draft Treaty on European Union. However, at the end, despite the British, Danish and Greek opposition, the Summit adopted, by reference to Article 236 of the EEC Treaty, a resolution to call an inter-governmental conference to negotiate a Treaty comprising amendments to the EEC Treaty with the object of institutional adjustment concerning the Council's decision-making process, the Commission's executive powers and the powers of the European Parliament; extension of the Community competence to certain areas such as the citizens' rights, culture, youth, education and sport as well as joint security and foreign policy²⁵.

Though outvoted Britain, through her Foreign Secretary²⁶, declared readiness to consider amendments to the EEC Treaty ("The Treaty not being immutable") provided such amendments are necessary, capable of helping achieve Community objectives and approved by all the Member States. Britain is not afraid of 'European Union'", he declared, but it was essential to know what all Member States meant by that term.

Legal Problems of Accession

1. Treaty Negotiation and Ratification

Under the British Constitution, the treaty-making power is vested in the Monarch (The Crown) but in practice the power is exercised on behalf of the Sovereign by his Ministers or duly authorised plenipotentiaries. Ratification, where required, is also an act of the Executive. Therefore neither the Courts nor Parliament are actively involved in the

25 Official text, Europe, 30 June 1985, pp. 2-4.

26 In a speech to the Anglo-German Society on 3 October 1985 at Bad Godesberg, The Times, 4 October 1985.

negotiation or ratification of treaties²⁷. Consequently an application for a declaration that by signing the Treaty of Rome the British Government would, in contravention of the Constitution, surrender part of the sovereignty of the Queen in Parliament, was dismissed as disclosing no reasonable cause of action. The Court of Appeal confirmed the position stating that "the treaty-making power of this country rests not in the courts, but in the Crown; that is, Her Majesty acting upon the advice of her Ministers. When her Ministers negotiate and sign a treaty, even a treaty of such paramount importance as this proposed one, they act on behalf of the country as a whole. They exercise the prerogative of the Crown. Their action in so doing cannot be challenged or questioned in these courts"²⁸.

2. Incorporation of Treaties

In the British approach to International Law a distinction is made between customary rules of International Law and the International Law of Treaties²⁹. The former, when recognised by British courts, become part of the Common Law and as such are binding like any other precedent. They are, therefore, directly enforceable by the courts. The latter is subject to the dualist theory which clearly distinguishes between the municipal law of a sovereign state and the rules of International Law governing relations between sovereign states. Therefore, treaties, though binding the contracting parties in the eyes of International Law, have no effect in their territories unless specifically incorporated into the municipal system of law. Consequently, a treaty to which the United Kingdom is a party by virtue of the exercise of the treaty-making power by the government, is not self-executing in the sense that it has no force of law automatically in the United Kingdom. To enable the provision of a treaty to be enforceable by the courts the intervention of

27 See Lord Coleridge CJ in *Rustomjee v R* (1896), 2 QB at 74.

28 *Blackburn v A-G* (1971), 1 WLR 1037, per Lord Denning M.R. at 1040.

29 See D. Lasok, *Les traités internationaux dans le système juridique anglais*, 4 *Revue Générale de Droit International Public*, 1966, p. 1 et seq.

Parliament is necessary. As stated in a celebrated case³⁰ "... Parliament, no doubt ... has a constitutional control over the executive: but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone. Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default ...".

It follows that without implementing legislation the Treaty of Accession whereby the United Kingdom joined the Community would have been without practical value. Precisely at that stage, in order to block the passing of the European Communities Bill, another application was made to the courts but, this time, for a declaration that the signing of the Treaty was contrary to the Bill of Rights of 1688³¹. This statute provided inter alia that "... the entire perfect and full exercise of the regal power and government be onely in and executed by ... their Majestyes and their successors". It was contended that by signing the Treaty of Accession the government was illegally signing away the constitutional powers of the Crown. The Court of Appeal³² confirmed the constitutional position of the Crown with regard to international treaties and added that it could not take into cognizance the Treaty of Accession before the Bill incorporating it into the British system had been enacted by Parliament, but when it had become law, the courts had no power to examine it constitutionally. The courts are subject to the sovereignty of Parliament.

3. The Sovereignty of Parliament

There were two main legal objections to the British membership of the European Communities based on the position of international treaties in the British legal system and the doctrine of the sovereignty of Parliament. As we have noted earlier the restrictive interpretation of the treaty-making power has been disposed of by the courts. Thus, whilst the

30 A-G for Canada v A-G of Ontario (1937) AC 326 per Lord Atkin at 347, 348.

31 This is one of the few written elements of the British Constitution enacted on the abdication of James II.

32 McWhirter v A-G (1972) CMLR 882 per Lord Denning M.R. at 886.

functions of the executive, the judiciary and the legislature are, in this respect, separate, the ultimate exercise of the government power is subject to the sovereignty of Parliament.

Reduced to simplicity the doctrine of the sovereignty of Parliament rests on two propositions, i.e. that the legislative power of Parliament is unlimited and that Parliament cannot bind its successors. The former gives effect to the supremacy of the legislature (i.e. the Monarch in Parliament) in the British democracy, whilst the latter reflects the unwritten constitution. Thus in the absence of a written constitution the British system does not know the distinction between a constitution and an ordinary act of Parliament. Hierarchically both are at the same level. Therefore there are no "entrenched" rules which can be altered only by a special procedure, as is usually the case of written constitutions. It also means that Parliament can undo the work of its predecessor and repeal or amend any laws passed by it.

The Sovereignty of Parliament was discussed in the White Paper of 1967 commissioned by the Labour Government in the wake of the second application for membership³³. The Paper confronted the problem in a realistic manner admitting that certain provisions of the Community Treaties will have direct effect in the United Kingdom and that, in case of conflict with British law, Community Law must prevail. Thus it recognized the doctrine of supremacy of Community Law enunciated by the Court of Justice of the European Communities. It also made it clear that the founding Treaties vested the Community Institutions with autonomous executive and legislative powers which meant that British Parliament must repeal or amend certain inconsistent laws and, in the future, refrain from legislating in a manner contrary to Treaty obligations. Thus the Community competence must be respected. The British courts, too, were warned that they will perform a new and unfamiliar task whilst administering Community Law and that they will have to refer cases to the ECJ for the interpretation of Community rules.

33 Legal and Constitutional Implications of United Kingdom Membership of the European Communities (1967) (Cmd 3301), para. 23.

A second White Paper³⁴ published in 1971 by the Conservative Government emphasised the sentiments and hopes associated with the renewed application for admission. It affirmed its predecessor's appraisal of the legal position and expressed readiness to submit to Community Treaties and the obligations resulting therefrom. However it endeavoured to reassure the British people, apprehensive of the consequences of joining the Community, that not only their rights and liberties would be safeguarded but also that new individual rights would accrue from the membership of the Community, whilst the country as a whole should derive economic advantages and gain new opportunities for commerce and industry. The legal problems had to be solved by Parliament.

The European Communities Act 1972

The European Communities Act 1972, though ranking no higher than ordinary legislation, has to be included among the statutes which affect the British Constitution. It consists of two parts and four schedules.

Part I consists of general provisions with the object of incorporating all the Community Law into the British system in accordance with the Community Treaties and the Act of Accession. Part II consists of amendments of Acts of Parliament governing the customs law³⁵; agriculture³⁶; sugar³⁷; cinematographic films³⁸; company law³⁹; competition law⁴⁰; criminal law⁴¹; and the duty of providing information to the Community⁴². The reason for this particular assortment seems to be that the areas singled out were directly relevant to membership and since they were

34: The United Kingdom and the European Communities (1971) (Cmnd. 4715).

35 S.5.

36 S.6.

37 S.7.

38 S.8.

39 S.9.

40 S.10. now repealed.

41 S.11.

42 S.12.

regulated by acts of Parliament it was convenient to effect the changes of the law in this particular manner. Many other areas, likely to be affected⁴³, had to wait for their turn.

The four Schedules comprise definitions relating to the Communities⁴⁴; provisions regarding the incorporation of Community legislation⁴⁵ and a list of acts of Parliament repealed⁴⁶ and amended⁴⁷.

In effect, as from 1 January 1973, by virtue of section 2(1) the pre-accession Community Treaties, as listed in the Act, became part of the law of the United Kingdom. Post-accession Treaties, on the other hand, were to become effective by virtue of Orders in Council (i.e. executive legislation) approved by resolution of both Houses of Parliament⁴⁸. However by this constitutional innovation the United Kingdom did not become a "monist" country generally but merely in relation to the European Communities and their Member States in the areas covered by the Treaties establishing the three Communities. A further restriction of the principle applied to the post-accession Treaties since these were not to be admitted automatically but merely by the simple expedient of executive legislation. Although not required to be enacted into British law by Acts of Parliament they were, nevertheless, to be subject to parliamentary supervision like any other delegated or executive legislation. In practice no problem has, so far, arisen in this respect.

In conformity with the Community classification the Act distinguishes between "directly applicable" and "non-directly applicable" rules of Community Law. The former, described as "enforceable Community rights"⁴⁹,

43 See S.A. de Smith, *The Constitution and the Common Market: A Tentative Appraisal* (1971) 34 MLR 597.

44 Sch.1.

45 Sch.2.

46 Sch.3.

47 Sch.4.

48 For a list of these see D. Lasok, *The Communities*, Halsbury's Laws, 1985, note 17.

49 European Communities Act, s.s. 1(2), 2(1), Sch. 1, Part II.

mean "all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the treaties, and all such remedies and procedures from time to time provided for by or under them as in accordance with the treaties are without further enactment to be given legal effect or used in the United Kingdom"⁵⁰. This passage reflects a most comprehensive concept of directly applicable Community law and since it refers to such rights being created "from time to time" it is a commitment concerning not only the past but also the future. Since, according to British constitutional theory, Acts of Parliament are considered to be "commands" this command has been addressed to all the institutions of the state including the Parliament itself. It means that directly applicable rules of Community Law (presumably as defined by the Treaties and the Court of Justice of the European Communities) have to be treated as such and applied by British courts without looking for authority in British municipal legislation. Indeed Section 3(2) provided that judicial notice shall be taken of the Treaties, of the Official Journal of the Communities and of any decision or expression of opinion by the Community Court.

Derivative Community Law (i.e. legislative measures enacted by the Community Institutions), which are not directly applicable, have to be implemented (i.e. incorporated into the British Legal System) by Orders in Council or Regulations⁵¹. These are executive instruments enacted by Her Majesty the Queen by Order in Council or any designated Minister of Department by Regulations. "Designated Minister of Department" means such Minister of the Crown or Government Department as may be designated by Order in Council in relation to any matter or for any purpose⁵². However Parliament is not precluded from legislating to that effect.

The delicate question of supremacy of Community Law was solved in a subtle way. The body of Community Law incorporated into the British system by virtue of the Act achieved precedence over conflicting prior

⁵⁰ Ibid. s. 2(1)

⁵¹ Ibid. s. 2(2)

⁵² See the European Communities (Designation) Orders 1972, S.I.1982 No. 1811 and subsequent Orders; see Lasok, op.cit., note 21.

British law either explicitly through express amendments effected by the Act itself, or implicitly by the application of the principle lex posterior derogat priori. Concerning the problems likely to arise after accession, the Act did not provide a constitutional guarantee of the supremacy of Community Law by expressly limiting the legislative power of Parliament. Instead it achieved this result in an indirect way without actually changing one of the cardinal principles of the British Constitution, i.e. the sovereignty of Parliament. Thus, through the combined effect of sections 2 and 3, section 2(1) brought about a comprehensive reception of enforceable Community rights, including the case law of the Community Court, of which the doctrine of supremacy forms an integral part. Two further provisions are relevant here. Section 2(4) provided that any enactment made or to be made by the Parliament ought to be interpreted and have effect subject to the foregoing provisions of that section, and section 3(1) provided that for the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties (as defined in the Act), or as to the validity, meaning or effect of any Community instrument, is to be treated as a question of law (and if not referred to the ECJ by virtue of article 177 of the EEC Treaty), be determined in accordance with the principles laid down by any relevant decision of the Court of Justice. Therefore, the courts and other law enforcement agencies have to apply Community Law like any branch of municipal law and to apply and interpret British Law subject to the duties imposed on the United Kingdom by the membership of the Community.

We should observe that not a single Member State has provided expressly for the supremacy of Community Law and that no other Member State has gone as far as to recognize expressly the binding force of the judgments of the Court of Justice as precedents to be followed in similar cases.

Direct Application of Community Law

British courts, from the beginning, understood their duty of applying Community law where appropriate and showed no inhibition or reticence in doing so. In the eyes of a famous judge⁵³ Community Law was like an

⁵³ Lord Denning, M.R. in *Bulmer v. Bollinger* (1974) Ch.401 at 418, 419.

incoming tide; it has filled our rivers and estuaries and nothing can hold it back. Therefore the courts had no option but to treat it like another dimension of national law. They were, however, clear that it was not drafted as tightly as the British Acts of Parliament and that, therefore, it required a less rigorous approach to its interpretation than British statutes⁵⁴. Whilst acknowledging the ultimate authority of the Community Court on the interpretation of Community Law the British courts also appreciated the necessity of uniform interpretation of that law in all the Member States⁵⁵ and to that end made use not only of the judgments of the Community Court but also of the other Member States' courts⁵⁶. One need only to consider in the reports the list of precedents to which the judge's attention is drawn. However one can also observe symptoms of a neophetic zeal with which English precedents of a certain vintage were treated in a rather cavalier fashion by reference to Community Law. Thus, for example, in *Schorsch Meier v Hennin*⁵⁷ a precedent laid down in 1605 whereby money judgments of English courts could be expressed only in Pound Sterling was overruled by the Court of Appeal by reference to article 106 of the EEC Treaty (liberalization of capital movements). The defendant owed a debt to the plaintiff in German Marks. However it was not paid and its value decreased because of the fall of the value of the Pound Sterling. The plaintiff claimed to be paid in German Marks. The court of the first instance rejected the claim based on article 106 of the EEC Treaty on the ground that the article had no direct effect upon English law and refused to refer the matter to the ECJ. However the Court of Appeal made history by declaring it directly applicable on the ground that the Treaty had the status of an act of Parliament and that it, therefore, had overruled the long-standing rule of English law. No reference to the ECJ for a preliminary ruling was thought to be necessary. However, in another case⁵⁸ the relevance of article 106

⁵⁴ Lord Denning, *ibid.* at 425; see also *Application des Gaz v Falks Veritas* (1974), Ch 381 at 393, 394.

⁵⁵ *Bulmer v Bollinger*, *op.cit.* at 425; see also *EMI Records v CBS Ltd* (1975) ICMLR 285 at 297.

⁵⁶ See *Re A Holiday in Italy* (1974) ICMLR 184 at 190.

⁵⁷ (1975) QB 416.

⁵⁸ *Miliangos v George Frank (Textiles)* (1975) 2CMLR 585 per Lord Wilberforce at 596.

to money judgment was questioned in the House of Lords. The House of Lords⁵⁹ has also rebuked the Court of Appeal for excessive enthusiasm in its endeavour to import alleged principles of interpretation of Community Law to English statutes incorporating international conventions⁶⁰.

By and large the application of Community Law presents no particular difficulty. Originally the EEC Treaty was defined as part of British law importing into the system "new commercial torts" in the field of competition law⁶¹ whilst, in the hierarchy of legal rules, the Treaty should rank equal to an act of Parliament⁶². However, although the European Communities Act 1972 is of a constitutional nature and commands that future legislation ought to be interpreted subject to its provisions⁶³, it does not, in the light of the doctrine of the sovereignty of Parliament, rank any higher than ordinary statutes.

A breach of Community law is regarded as a breach of a statutory duty enshrined in the European Communities Act 1972 attracting, therefore, remedies the British system provides for the vindication of the rule of law. These include a declaration of nullity of the act involved, an order of mandamus to enforce the performance of the public duties of persons, bodies and inferior courts, damages where loss has been sustained and injunction to restrain the defendant from committing breaches of the law in the future and thus enforce his correct behaviour⁶⁴. However the theory of the statutory breach has to be applied in the context of a specific action for a mere breach may not necessarily secure to the plaintiff the remedy sought. Thus, whilst the Treaty binds the United Kingdom in its entirety, not every breach of it by the State, not even one resulting in an enforcement action before the ECJ, will, necessarily result in a pri-

59 Per Viscount Dilhorne at 164 in *James Buchanan v Babco* (1978) 11 CMLR 156 and per Lord Diplock at 220 in *The Siskina* (1978) 1 CMLR 190.

60 See Lord Wilberforce in *James Buchanan*, op.cit. at 161 who regarded such an approach both "unnecessary and masochistic".

61 *Application des Gaz*, op. cit. at 396 (per Lord Denning).

62 *Schorsch Meier v Hennin* (1975) 1 All ER 152.

63 See *supra*.

64 See *Garden Cottage Foods v Milk Marketing Board* (1983) 2 All ER 770; (1983) 3 CMLR 43, H.L.; see also *Case 222/82 Apple and Pear Development Council v Lewis* (1984) 2 CMLR 733

vate remedy available to an individual or a corporation. To be a breach of a statutory obligation it must be one of a directly applicable rule having also a direct effect⁶⁵. Moreover it must occur in the circumstances giving rise to a remedy under the municipal law. Thus it was held by the Court of Appeal⁶⁶ reversing the judgment of the court below^{66a} that a breach of article 30 of the EEC Treaty which prohibits quantitative restrictions on imports, confirmed by the ECJ⁶⁷, will enable the plaintiff to claim damages from the British Government only in the case of an abuse of power. The revocation of a general licence authorizing the landing in the United Kingdom of poultry and poultry parts in contravention of the Treaty was held not to be such an abuse. Earlier the House of Lords held⁶⁸ that a contravention of article 86 of the EEC Treaty by the Milk Marketing Board which caused damage to an individual gave rise to a cause of action in English law of the nature of a breach of statutory duty. These two cases can be reconciled in so far as the former concerned the exercise of a public duty by a Minister of the Crown acting for the benefit of the country as a whole whereas in the latter case a statutory body acted for the benefit of private interests. Clearly the doctrine remains yet to be refined.

British courts have shown no inhibition or reluctance in recognizing the supremacy of Community Law⁶⁹. However, in view of the doctrine of the sovereignty of Parliament, the courts have to consider the nature of the

65 See Lord Denning M.R. in *Shields v. E. Coomes* (1979) 1 All ER 456 at 461.

66 Oliver L.J. dissenting in *Bourgoin SA v Ministry of Agriculture*, *The Times*, 5 August 1985; (1985) 3 All FR 585.

66a (1984) 1 CMLR 519 QB.

67 (1983) ECR 203; (1983) 2 CMLR 1.

68 *Garden Cottage Foods v Milk Marketing Board* (1984) AC 130 at 141 and 144.

69 E.g. *Graham, J. in Aero Zipp Fasteners Ltd. v YKK Fasteners (UK) Ltd.* (1974) RPC 624 at 625 (1973) CMLR 819 at 820; *Bridge, J. in Esso Petroleum Co. v Kingswood Motors* (1974) QB 142 at 151; (1973) CMLR 665 at 676; House of Lords in *R v Henn*, *R v Darby* (1980) 2 All ER 166; (1980) 2 CMLR 229.

conflict between the relevant Community rule and the subsequent act of Parliament. Thus, if on close examination it should appear that United Kingdom legislation is deficient, or is inconsistent with Community Law, by some oversight of the draftsmen, then it is the courts' bounden duty to give priority to Community Law⁷⁰. However, if Parliament deliberately passes an Act with the intention of repudiating the EEC Treaty or any provision in it, or intentionally of acting inconsistently with it, and says so in express terms, then it would be the courts' duty to follow the Act; but unless there is such an intentional and express repudiation of the Treaty, it is the courts' duty to give priority to the Treaty⁷¹. The courts carry out the intention of Parliament in their independent way. They are governed by the European Communities Act 1972 and the principle of the Constitution. Where they can interpret legislation in accordance with the Act they will do so but should Parliament renege on it the courts would have to follow suit.

References for Preliminary Rulings

When the question of the reference to the ECJ was raised for the first time the reaction of the leading judge was that this should be subject to the guidelines of the Court of Appeal⁷² and this would, in effect, restrict the discretion of judges. Although somewhat unsafe, these guidelines, coming from such a high judicial authority have, at times, influenced lower courts and tribunals⁷³. However, on the whole, the adjudicating bodies remain uninhibited and the willingness to refer is testi-

⁷⁰ : Per Lord Denning M.R. in *Shields v E. Coomes* (1978) ICR 1159 at 1165, 1166 (1979) 1A11 ER 456 at 460, 461, CA and in *Macarthys v Smith* (1979) ICR 785 at 788, (1979) 2A11 ER 325 at 328, (1979) 3CMLR 44 at 47.

⁷¹ *Macarthys*, op.cit., at 789; see also Lord Denning M.R. in *Felixstowe Dock and Rly v British Transport Docks Board* (1976) 2 Lloyd's Rep. 656 at 662, 663, (1976) 2 CMLR 655 at 664, 665, and *Megarry V.C.* in *Manuel v A-G* (1983) 1 Ch 77 at 89.

⁷² Per Lord Denning M.R. *Bulmer v Bollinger* (1974) Ch 401 at 420-425, (1974) 2CMLR 91 at 113-118.

⁷³ See *R v Secchi* (1975) 1CMLR 383 at 385 (a Metropolitan Magistrate); *English-Speaking Union of the Commonwealth v Customs and Excise Commissioners* (1980) 1CMLR 581 at 599 (VAT Tribunal); *Extrude Hone Corpn. v Heathway Machine Sales* (1981) 2CMLR 379 at 399; *Burton v British Railways Board* (1981) 3CMLR 100 at 102 (Employment Appeal Tribunal) and *R v Tymen* (1980) 3CMLR 101 at 107 (High Court Judge).

fied by the growing number of references both from the lowest level of adjudication⁷⁴ and the higher courts including the House of Lords. If by comparison with other countries the number of British references appears to be low, the reason is that, in the United Kingdom only a small proportion of potentially litigious cases come before the courts. Taxes and customs matters are negotiable between the individual and the respective authorities and, therefore, the courts become involved only on rare occasions in matters of principle after the conciliatory procedure before commissioners appointed for the purpose has been exhausted. Social security claims are dealt with by special tribunals set up to resolve the problems amicably rather than at the arm's length. In commercial matters extensive use of arbitration is made and liberal professions maintain their own domestic conflict-solving machinery and procedure. Finally, the question whether or not to refer to the ECJ is a justiciable matter subject to oral argument in open court as a result of which the judge will formulate the relevant questions with the assistance of the lawyers representing the parties involved. Indeed British judges insist that the factual situation is firmly established⁷⁵ and that the issues are so narrowed down as to enable the questions to be framed in a manner which will ensure that the court is provided with real assistance⁷⁶.

However despite all the caution and judicial care it is arguable that some cases⁷⁷ should have been referred whilst no reference should have been made in *R. v Saunders*⁷⁸ because the Community Law was not involved or *R. v Pieck*⁷⁹ because, in the light of Community legislation and the relevant case law, the position was quite clear.

74 For examples see cases cited in L. Collins, *European Community Law in the United Kingdom*, 3rd ed. 1984, p. 140 et seq.

75 See for example *Church of Scientology v Customs and Excise Commissioners* (1981), 1 All ER 1035.

76 *Bethell v SABENA* (1983) 3CMLR 1, see also Scottish case *Prince v Younger* (1984) 1CMLR 723.

77 E.g. *Schorsch Meier v Hennin*, op.cit.; *R v Secchi*, op.cit.

78 Case 175/78 (1979), 1129.

79 Case 157/79 (1980), ECR 2171.

Enforcement Actions against the United Kingdom

Our survey of the British scene would be incomplete without reference to British delinquency, that is, behaviour which brought the country before the Community Court of Justice. Statistically⁸⁰ the British record is not discreditable though, ideally, in the Community based on the idea of Rechtsstaat the Member State ought to demonstrate exemplary behaviour.

The first enforcement case³¹ against the United Kingdom has a party political background. The Labour Government with a slender majority in the House of Commons, under pressure from a powerful trade union, enacted a permissive regulation to implement the mandatory installation of the recording device in vehicles designated by Community Law³². The breach of the duty consisted in the provision that the installation was voluntary without the backing of a penal sanction. The government reluctantly accepted the judgment but soon was voted out of office and its Conservative successor implemented the regulation without any trouble from the industry of the trade union concerned.

Several cases reflect the problems involved in the movement of goods. In the first case in this line the British Government imposed a ban on the importation of potatoes which was legitimate within the transitional period but became a breach of the Treaty since it continued when the Treaty became fully operational⁸³. The enforcement action followed a reference for a preliminary ruling regarding the validity of the ban⁸⁴. Condemned, the British Government lifted the ban. It is interesting to note that in its defence the Government relied on a literal interpretation, (i.e. the Bri-

80 See D. Lasok, *The United Kingdom before the Community Court, Rechtsvergleichung, Europarecht und Staatenintegration, Gedächtnisschrift für Léontin-Jean Constantinesco*, 1983, p. 439 et seq.

81 Case 128/78 *Commission v United Kingdom, re Tachograph* (1979) ECR 419.

82 Council Reg. 1463/70, O.J. 1970, L. 164/1; O.J. 1970, L. 482 amend. by Reg. 1787/73, O.J. 1973, L. 181/1, amend. by Reg. 2828/77, O.J. 1977, L. 334/5.

83 Case 231/78 *Commission v United Kingdom* (1979) ECR 1447.

84 Case 118/78 *C.J. Meyer v Department of Trade* (1979) ECR 1387.

tish style of statutory interpretation) of the relevant provisions of the Act of Accession and the arguments previously, albeit unsuccessfully, advanced by the French Government in its defence of restrictions on the importation of bananas⁸⁵. Not surprisingly the United Kingdom was supported by France intervening since, evidently, at that time the French Government was already taking up a position to defend its restriction on the importation of sheepmeat from the United Kingdom⁸⁶.

The "guerre des moutons" with France is reflected in two cases in which the British Government imposed a ban on the importation of ultra high temperature treated milk and cream⁸⁷ and poultry and poultry parts⁸⁸ from France. The former followed a reference from a French court⁸⁹ in which the ECJ held that import licences could be refused because the packaging did not conform to the British requirements. This was a valid defence because at that time the metric system was not as yet applicable to the United Kingdom and, therefore, the traditional measures for liquids could still be applied. However, in the enforcement action this defence was no longer valid whilst the arguments that Britain could, by virtue of the derogation clause in article 36 of the EEC Treaty, refuse admission of the product on the ground of public health, was dismissed. The same argument was dismissed in the poultry case. An action for damages arising from the latter was, as we have noted earlier⁹⁰, unsuccessful since in the eyes of the English court there was no abuse of power of the kind that would provide a remedy under municipal law. However as a result of the enforcement actions the restrictions were lifted.

British defence in the fishery cases⁹¹ that, pending the finalization of the Common Fisheries Policy, the national fishery conservation measures

85 Case 48/74 Charmasson v Minister for Economic Affairs and Finance (1974) ECR 1383.

86 Case 232/78 Commission v France (1979) ECR 2729.

87 Case 124/81; O.J. 1981, C.157/9.

88 Case 40/82 Commission v United Kingdom O.J. 1982, C.65/10; (1982) ECR 2793; (1982) 3CMLR 497.

89 Case 244/78 Union Laitière Normande v Dairy Farmers (1979) ECR 2663.

90 Bourgois SA v Ministry of Agriculture, *on.cit.*

91 Case 32/79 Commission v United Kingdom (1982) 1CMLR 219; Case 804/79 Commission v United Kingdom (1981) ECR 1045.

were justified, had failed. It is interesting that one of these cases followed a reference for a preliminary ruling⁹² and that the conflict with France in that area triggered off the only direct action between the Member States⁹³.

Quaint British customs regarding the drinking of beer as compared with the drinking of wine were, albeit unsuccessfully brought to the judicial notice in the enforcement action against the United Kingdom⁹⁴ in conjunction with actions against four other Member States⁹⁵ accused of giving tax advantages to national alcoholic beverages and thus contrary to article 95 of the EEC Treaty, discriminating against similar imported products. Since no British Government would risk electoral suicide by imposing excessive tax on beer and since the difference between beer and wine is more keenly appreciated in Britain than in the Court at Luxembourg a typical British compromise was reached: a slight increase of the tax on beer and a slight reduction of the tax on the imported wine.

Finally, following a string of references⁹⁶ to resolve the conflict between national legislation concerning sex discrimination and equal pay for men and women and the Community rules⁹⁷, in which the ECJ found the British law deficient, an enforcement action was brought and won by the Commission⁹⁸. The national law will be amended accordingly.

CONCLUSION

It can be said, in conclusion, that the legal problems which seemed quite unsurmountable at the time of accession have been satisfactorily resolved and that, in practice, the United Kingdom and its institutions have

⁹² Case 269/80 R v Tymen (1981), ECR 3079.

⁹³ Case 141/78 France v United Kingdom (1980), ECR 2923.

⁹⁴ Case 170/78 Commission v United Kingdom (No.1) (1979), ECR 1447; (No.2) (1982), 3CMLR 512.

⁹⁵ Cases 168/78 Commission v France (1980, ECR 347; 1969/70 Commission v Italy (1980), ECR 385; 171/78 Commission v Denmark (1980), ECR 447; 55/79 Commission v Ireland (1980), ECR 417.

⁹⁶ Cases 69/80 Warringham and Humphreys v Lloyds Bank (1981), 2CMLR 1; 96/80 Jenkins v Kingsgate, *ibid.* 24; 12/81 Garland v British Rail (1982), 1CMLR 696; 19/81 Burton v British Rail (1982), 2CMLR 136.

⁹⁷ EEC art. 119 and Council Directive 75/11 O.J. 1976, L. 39.

⁹⁸ Cases 61/81 Commission v United Kingdom, Re Equal Pay (1982) 3CMLR 284; 165/81 (1984), 1CMLR 44.

settled down to a constructive membership of the Community. The British record of failures to carry out Community duties is moderate and where such failures have been identified the United Kingdom has complied without trying to obtain an economic recompense for its own delinquency.

The membership of the Community and the development of the Community remains an issue mainly because of the shape of the British internal politics, i.e. the rivalry of the main political parties within the essentially two-party system. However a party in opposition acts more responsible when in government. The hard core of "anti-marketeers" remains unconvinced not only because it lacks the vision of a United Europe but also because the Community itself seems to project an uninspiring image. The idealism of the fathers of the Community has not been inherited by their sons who labour in conditions different from those of the post-war times.

The British are undemonstrative and, mindful of their experience, are unlikely to leap into the dark of the future with dramatic gestures or slogans on their lips. This attitude was confirmed in the recent debate⁹⁹ on the report of the European Communities Committee of the House of Lords on the proposed Draft Treaty establishing the European Union when the Minister of State for Foreign Affairs emphasized that the Government would take a view on any overall package of proposals on the basis of whether or not it would contribute to practical improvements of the working of the Community. The British political system, marked by continuity and stability unrivalled in the other Member States, is the result of a long empirical process. The short-lived Community has not as yet achieved the objectives laid down in the founding Treaties. Therefore, in the eyes of the British, it cannot progress satisfactorily without first carrying out the policies contained therein. In this respect they echo the words of Robert Schuman who said that "... l'Europe ne se fera pas d'un coup dans une construction d'ensemble, elle se fera par des réalisations concrètes créant d'abord une solidarité de fait ...".

⁹⁹ The Times, 22 October 1985.